NOT DESIGNATED FOR PUBLICATION

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA08-954

STEPHEN ISELY & SHARON ISELY, APPELLANTS V. ANNIE BROCKMAN ODOM & CLIFTON GILREATH, APPELLEES	**Opinion Delivered** MARCH 18, 2009 APPEAL FROM THE CONWAY COUNTY CIRCUIT COURT, [NO. CV2007-28] HONORABLE DAVID H. MCCORMICK, JUDGE AFFIRMED

RITA W. GRUBER, Judge

Appellants Stephen and Sharon Isely appeal from an order of the Conway County Circuit Court dismissing their complaint for quiet title in certain lands and finding that they did not prove that their predecessors in interest had acquired title to the disputed property by adverse possession. On appeal, they contend that the circuit court's finding on their adverse-possession claim was clearly erroneous. We find no error and affirm the circuit court's order.

I.

The eighty-acre parcel in dispute is referred to by the parties, and in a map of certain sections in Conway County introduced at trial, as the "Jim Brockman 80." Desiring to purchase the disputed property, Mr. Isely obtained information from a title company indicating that the property was originally acquired by James (Jim) Brockman in the early 1900s. In a deed recorded in 1942, James Brockman, M.B. Brockman, and Clemmie Brockman conveyed the property to J. and T.R. Clinkscale. Finally, in a deed recorded in

1948, the Clinkscales conveyed the property to M.B. Brockman. The conveyance to M.B. Brockman was the last recorded deed regarding the property.

A federal census record from 1910 showed that Jim and Amy Brockman had six children, including Burnish and Mamion. Burnish died in 1966. Mr. Isely, apparently believing that "M.B." referred to Burnish, purchased the property from five of the six descendants of Burnish Brockman in January 2007.[1] Appellee, Annie Odom, a daughter of Burnish Brockman, refused to sell her interest in the property to Mr. Isely. As a result of her refusal, Mr. and Mrs. Isely began this lawsuit by filing a petition for partition and division in which they requested the circuit court to order Ms. Odom to sell her 1/6 interest in the property.

On March 15, 2007, appellee Clifton Gilreath, a son of Ms. Odom, alleging that he was the owner of the Jim Brockman 80, petitioned for intervention in the lawsuit. He attached several deeds to his petition: (1) the 1942 deed from James Brockman, M.B. Brockman, and Clemmie Brockman conveying the property to the Clinkscales; (2) the 1948 deed from the Clinkscales conveying the property to M.B. Brockman; and (3) a deed recorded on March 6, 2007, from Ray Brockman, Jr., the sole surviving heir of M.B. Brockman, conveying the property to Clifton and Dorothy Gilreath. Also on March 15, 2007, Ms. Odom filed a response to the Iselys' petition and a motion to dismiss, denying that she was the owner of any interest in the disputed property, contending that the Iselys had no

[1]Burnish and Classie Brockman's children were Annie, William, Frank, James, L.D., and Matthew.

legal interest in the property and therefore no standing to bring the action, and requesting the circuit court to dismiss the Iselys' petition.

The circuit court granted Mr. Gilreath's petition for intervention. The Iselys filed a cross complaint against Mr. Gilreath claiming that they owned the property by purchasing it from the Burnish Brockman heirs, who had acquired title to the property through adverse possession. The Iselys requested the court to quiet title in them. The Iselys pursued alternate theories at the hearing on the matter: common law adverse possession and adverse possession under Ark. Code Ann. §§ 18-11-102 & 103 (Repl. 2003).

On May 2, 2008, the circuit court entered an order finding in favor of the appellees and dismissing appellants' claim. The court incorporated in full a letter opinion dated April 22, 2008, containing its findings of fact and conclusions of law. In its letter opinion, the court rejected appellants' claim of statutory adverse possession, finding that appellants did not have color of title; that payment of taxes under the name "Jim Brockman" was not sufficient to satisfy the requirements of Ark. Code Ann. § 18-11-103 creating a presumption of law that a person who pays taxes on wild and unimproved land for fifteen years holds color of title; and that there was insufficient proof that the land was "unimproved and unenclosed." The court also rejected appellants' claim of common law adverse possession, finding that the requirement of continuity had not been proven because no one testified how Burnish and his wife Classie came into possession of the land or how long they had been in possession. Further, while Burnish's descendants testified that they used the land and paid taxes for varying periods of time, the court noted that none of the witnesses provided evidence or testimony about the

exact dates when they did so. In addition, the court found that the Iselys had failed to prove that their possession and that of their predecessors in interest was hostile or with the intent to hold against the true owner. The court found no proof of the intent with which Burnish's descendants held the land. The court recognized that all of the witnesses testified that they knew the land did not belong to them but was "heir" land and that they were not asserting ownership. There was no evidence of any notice to M.B. Brockman or any of his heirs that a hostile claim was being asserted to his property. Finally, the court cited our law that stronger evidence of adverse possession was required in cases where a family relationship existed.

II.

Appellants have appealed, challenging only the court's determination that they did not prove common law adverse possession. We review adverse-possession cases de novo on the record, and we will not reverse a circuit court's finding of fact unless it is clearly erroneous. *See Robertson v. Lees*, 87 Ark. App. 172, 181, 189 S.W.3d 463, 469 (2004). In reviewing a circuit court's findings of fact, we give due deference to the judge's superior position to determine the credibility of witnesses and the weight to be accorded to their testimony. *Id.*

In order to establish title by adverse possession, the Iselys had the burden of proving that their predecessors in title, Burnish Brockman's descendants, had been in possession of the property continuously for more than seven years and that the possession was visible, notorious, distinct, exclusive, hostile, and with the intent to hold against the true owner. *Id.* at 183, 189 S.W.3d at 471. Whether possession is adverse to the true owner is a question of

fact. *Id*.

Turning to the testimony at trial, some of the predecessors in title from whom Mr. Isely obtained deeds testified that they had used the property and paid taxes at separate times over the years. Charlene Brockman White, who married James Brockman in 1960 and divorced in 1984, testified that, when she was married to James, he asked the family if anyone was using the disputed property. When he learned that no one was using the property, he put cows on it, mended the fences, and cut wood. She testified that he also paid taxes on the property in the 1970s until the 1980s. She said that to her knowledge the land belonged to the Burnish Brockman family and had always been considered "heir" property. She said that James eventually got into the construction business and quit using the land and that somebody else "took up the land and started paying taxes on it, but I don't know which one." She did not indicate exactly when any of this took place or for precisely how long James used or paid taxes on the property.

Matthew Brockman testified that, when he was a child, his family used the disputed land to "run cows" and for farming. He said that his mother paid taxes on the land. He testified that, when his mother quit "fooling with cows," she quit paying taxes on the land and his brother Bill stepped in. He testified that Bill had cattle on the property for a while and, when Bill quit using the land, James used the property and paid the taxes on it. Finally, Matthew testified that he began paying the taxes and kept cattle on the property, maintained the land, and cut and sold some timber. He said that he began paying taxes on the property in about 1990, although he admitted that the taxes were delinquent at times. It is unclear

from his testimony exactly how he used the property because he testified that he used the property for about ten years, ending in 1999, and that he sold his cows in 1986 or 1987. In any event, he stated that he quit paying the taxes because he "felt that somebody else should pay some taxes, too, since it was family land." He said that the taxes were paid over the years in the name of Jim Brockman. Finally, he said that he did not know that the property was deeded to his uncle, M.B. Brockman, and that he did not know if any of his brothers ever put anyone on notice that they were claiming the land.

Finally, Frank Brockman testified that he had never personally used or paid taxes on the property. He said that he thought that the land belonged to the Brockman family and that he did not know of anyone other than his family who claimed an interest in the property. He also testified that the taxes were paid in the name of Jim Brockman, his grandfather, and he thought the land was Jim Brockman's land.

William Strickland, who had lived near the property and owned adjoining land for twenty-six years, testified that, although there had been some trees cut from the property, he had never known of anyone working the property or having cattle on it. He said that the property was grown up, that it was not posted, and that he had hunted on the property.

The last witness was Clifton Gilreath, who testified that the only living descendant of M.B. Brockman (Mamion) was Ray Brockman, Jr., from whom he obtained his deed to the property. Clifton testified that he lived with Ray's father Raymond in Colorado in the 1960s and that Raymond had spoken of the property to him at that time. He testified that he knew that the last recorded deed to the property had been to Raymond's father. He also testified

that, when he was growing up in the 1950s, he and his uncles, Matthew and L.D., had driven his grandmother's and his mother's cattle to the Burnish Brockman 80 that is now owned by Mr. Isely, which is the property directly north of the Jim Brockman 80. He testified that they did not "run cattle" on the Jim Brockman 80. He also testified that he moved back to the area in 1975 and that the property was grown up and has never been used to "run cattle."

Based upon our review of this evidence, we cannot say that the circuit court's findings are clearly erroneous. The evidence is not clear that the Burnish Brockman descendants used the property continuously to "run cattle" for seven years; indeed, there was testimony by Mr. Strickland and Mr. Gilreath that the property was never used for that purpose. Discrepancies in the testimony are matters involving credibility for the trier of fact to resolve. Moreover, Mr. Isely's predecessors in title all testified that they believed the land was "heir" property or family land. There is no clear indication that they knew the land had ever been conveyed from their grandfather Jim Brockman to anyone. When the evidence is conflicting or evenly poised, or nearly so, the judgment of the trial court on where the preponderance of the evidence lies is persuasive. *Belcher v. Stone*, 67 Ark. App. 256, 261, 998 S.W.2d 759, 762 (1999).

In addition, there was no evidence to support the requirements that the possession be hostile or that Mr. Isely's predecessors intended to hold against the true owner. The law requires stronger evidence of adverse possession where a family relationship is present. *See Robertson*, 87 Ark. App. at 184, 189 S.W.3d at 471. "The reason for this rule is that, as between parties with family relations, the possession of the land of one by the other is

presumptively permissive or amicable, and, to make such a possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land." *Id.* Furthermore, where initial possession is permissive, the presumption is, absent proof to the contrary, that subsequent possession is also permissive. *Gibbs v. Pace*, 207 Ark. 199, 203, 179 S.W.2d 690, 692 (1944). Thus, even assuming the Burnish Brockman descendants were in fact using the Jim Brockman 80 as they testified that their parents had done before them, there is no evidence regarding whether their parents were using the property with or without permission from the true owner, Burnish's brother M.B. Brockman.

Accordingly, we hold that the circuit court's finding that the Burnish Brockman descendants did not own the disputed property by adverse possession at the time they conveyed the property to Mr. and Mrs. Isely is not clearly erroneous.

Affirmed.

GLOVER and MARSHALL, JJ., agree.